IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 736

WONG DOO, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA,
RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI AND NOTICE OF PRESENTATION OF PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JACKSON H. RALSTON,
GEORGE W. HOUK,
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*Attorneys for Petitioner.*

WM. J. DAFFRON,
Cleveland, Ohio,
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## PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Wong Doo, respectfully represents:

I.

That petitioner is a Chinese person who was admitted at San Francisco, California, on January 25, 1915, as the minor son of a Chinese merchant, Wong Sun. He lived with his father and brother, Wong Fee, in San Francisco, California, where his father,

who had re-entered the United States in August, 1914, as a domiciled merchant, carried on a mercantile business as a partner and merchant in the firm of Chong Lee and Company.

In April, 1915, petitioner with his father, Wong Sun, and his brother came to Cleveland, Ohio, for the purpose of establishing a mercantile business, but residing temporarily at a Chinese laundry.

II.

In August, 1915, petitioner with his father and brother were arrested in Cleveland, Ohio, and summarily tried by the Immigration authorities under the provisions of the Immigration Act of February 20, 1907, charged with a violation of the Chinese Exclusion Laws in having fraudulently secured admission to the United States. An order of deportation on April 5, 1916, was made for petitioner, his father, brother and another Chinaman, Chan Yim, also found in the laundry. All were discharged from custody under that order on a writ of habeas corpus March 28, 1918, following the decision of the United States Supreme Court in United States vs. Woo Jan, 245 U. S. 552. The only question considered and argued in the habeas corpus hearing was as to the jurisdiction of the Department of Labor in the cases.

III.

Petitioner with the other Chinamen was rearrested upon new warrants under Section 19, General Immigration Act, February 5, 1917, charged with violation of the Chinese Exclusion Acts and

an order of deportation issued based upon the evidence of the former hearing. Petitioner presented to the United States District Court for the Northern District of Ohio, Eastern Division, his application for a writ of habeas corpus attacking the validity of an executive instead of a judicial hearing. On December 14, 1920, his application was denied. The only question argued and considered was the validity of an executive hearing although the question as to the fairness and regularity of the executive hearing was raised and put in issue by the pleadings without, however, attaching to the petition a copy of the departmental record of the hearings.

IV.

The United States Circuit Court of Appeals for the Sixth Circuit on June 28, 1922, in accordance with the decision of the United States Supreme Court in Ng Fung Ho vs. Edward White affirmed the judgment of the District Court, considering only the question as to the validity of an executive hearing.

V.

Petitioner on August 8, 1922, made application to the United States District Court, Northern District of Ohio, Eastern Division, for a writ of habeas corpus based upon the grounds that the proceedings before the Immigration authorities were unfairly and irregularly conducted, that certain letters and documents were taken from the possession of petitioner and used against him, and that the Immigra-

tion Authorities applied erroneous conclusions of law to the facts and wrongly held as a proposition of law that the performance of manual labor in August, 1915, by a Chinaman who had re-entered the United States a year previous as a domiciled merchant and had engaged in business as such for at least six months thereafter would constitute a fraudulent re-entry and affect his minor son's admission as fraudulent.

By an amended return, the United States raised the doctrine of res judicata as a bar to this action, and on this ground, the District Court denied the application.

VI.

The United States Circuit Court of Appeals for the Sixth Circuit on December 12, 1923, affirmed the judgment of the District Court, holding that the principles of res judicata operated as a bar to this application.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding the said court to certify to this court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled "Wong Doo, Appellant, vs. The United States of America, Appellee," to the end that the said case may be reviewed and determined by this Court as provided by law.

## BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

### Statement.

The petitioner was discharged upon his first application for a writ of habeas corpus on March 28, 1918, for jurisdictional reasons and no question as to the fairness, regularity or legal conclusions by the Immigration Department in their proceedings was argued or decided.

The second application for a writ of habeas corpus upon petitioners re-arrest was disposed of by holding that the Immigration Department had jurisdiction under the Act of 1917 without presentation, argument or consideration of the nature of the proceedings before the Immigration Department or the conclusions of law made by Departmental officials.

The present application is based upon the nature of the Departmental procedure and conclusions of law reached which matters have never received consideration by any court.

The petitioner has been denied his present application upon the theory that the doctrine of res judicata applied.

### Argument.

The writ of habeas corpus is of very ancient origin, antedating Magna Charta, and regarded as the greatest and most important remedy known to the law. Its origin and purpose differentiate it from other legal procedure so that for this reason the doctrine of res judicata would not apply.

The United States Supreme Court did not apply the doctrine of res judicata in the following cases wherein, after denial of one application, subsequent applications for the writ were made:

> Carter vs. McClaughry, 183 U. S., 365.
> In re Jugiro, 140 U. S., 291.

The Circuit Court of Appeals in Carter vs. McClaughry, 105 Fed. 614, held:

> "The denial of a writ of habeas corpus by the Federal Courts of one Circuit does not render the questions determined res judicata, so as to preclude their re-examination by the courts of another circuit in subsequent habeas corpus proceedings instituted therein by the same petitioner."

In Chin Fong vs. White, 258 Fed. 849, a second application for a writ of habeas corpus in a Chinese deportation case was permitted after denial of the first, where a different question of law was raised and decided.

The state courts of Massachusetts, New York and Ohio have followed this doctrine as to applicability of res judicata to the writ of habeas corpus. See Bradley vs. Bettle, 153 Mass. 154. People ex rel. Joeb Lawrence vs. John R. Brady, etc., 56 N. Y. 182, the case in in re Lutzler, 18 O. C. C., Rep. 826, where the court in the syllabus says:

> "Where an application for a habeas corpus has been refused by one court, another application to another court for such writ is ad-

missible, notwithstanding under Section 5751 R. S., such first decision might be reviewed on error."

The following text writers support the proposition that the doctrine of res judicata does not apply to habeas corpus proceedings where there has been a refusal to discharge on the writ.

The following text writers are relied upon:

Foster "Federal Practice, 6th Edition, Vol. 3, page 2358."

"The doctrine of Res Adjudicata does not apply to denials of application for the writ, and successive petitions may be presented to different judges who have power to entertain it, after the same prayer has been previously denied * * * ."

Bailey—"Habeas Corpus, Vol. 1, page 206, paragraph 59."

"As a general rule Res Adjudicata has no application to habeas corpus proceedings where there has been a refusal to discharge on the writ. That a refusal to discharge on one writ is not a bar to the issuance of a new writ."

"Corpus Juris, 29 C. J., page 179, Habeas Corpus, paragraph 203:"

"Of refusal to Discharge—(1) At common law—In a few jurisdictions, it is held, even in the absence of a statute so providing, that a refusal to release the relator in a habeas corpus proceeding is conclusive on a subsequent application as to all points presented or which might have been presented on the first application, at least where the imprisonment is in

> a civil case, or where the decision is subject to review on appeal, writ of error, or certiorari. But by the great weight of authority, the rule is, in the absence of a statute providing otherwise, that a refusal to grant a writ of habeas corpus, or a dismissal of the writ, or a remand of the relator to custody, or other refusal to discharge him, is not a bar to, or res judicata on, a subsequent application for the writ. In the absence of statutory restrictions, the person detained may make successive applications to every court or judge having jurisdiction."

The merit of the present application for a writ consists in this: that petitioner is being deported under an order based upon the erroneous conclusion of law that a Chinese merchant who has re-entered this country and carried on a mercantile business for several months can be later charged with having re-entered fraudulently simply because he is found in a Chinese laundry and charged with having labored there. The evidence adduced by the Department substantiates these facts and evidences the error in legal conclusions. Furthermore, the fairness and regularity of the Departmental hearing is challenged in this respect, that certain letters and papers were taken by the Immigration officers from the possession of petitioner's father and used against him over his objection.

That petitioner has not been dilatory in asserting his right is evidenced by the fact that he was first discharged, then by virtue of a change in the law, re-arrested upon the original complaint dressed up to suit the change. His second application was made

at a time when the jurisdictional question had not yet been determined by the highest court, but was differently interpreted by certain United States Circuit Court of Appeals and District Courts.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals holding the doctrine of res judicata a bar to the present application is erroneous and its consequences subversive of the purpose of the writ of habeas corpus. It should, therefore, be reviewed by This Court and reversed.

Dated, January 7, 1924.

JACKSON H. RALSTON,
GEORGE W. HOTT,
*Attorneys for Petitioner.*

WM. J. DAWLEY,
*Of Counsel.*

**Certificate of Counsel.**

I hereby certify that I am of counsel for petitioner and that in my opinion the foregoing and annexed petition for a writ of certiorari is well founded as to matters of fact and as to questions of law, and is not interposed for delay.

Dated, January 7, 1924.

GEORGE W. HOTT,
*Of Counsel for Petitioner.*

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RESPONDENT.

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**NOTICE OF PRESENTATION OF PETITION FOR WRIT OF CERTIORARI.**

To Harry M. Daugherty, Attorney-General of the United States, and Assistant Attorney-General of the United States, Washington, D. C.

Sirs: You, and each of you, will please take notice that the petitioner above named, through his counsel, will present to the above named Court, on the 28th day of Jan, 1924, at the hour of twelve o'clock noon of said day, or as soon thereafter as his counsel can be heard, at the courtroom thereof, in the Capitol Building, in the City of Washington, District of Columbia, a petition for a writ of certorari.

Said petition will be based upon this notice, the accompanying petition for a writ of certiorari, and all of the papers and records on file.

Dated, January 17", 1924.

Yours, etc.,

JACKSON H. RALSTON,
GEORGE W. HOTT,
*Attorneys for Petitioner.*

WM. J. DAWLEY,
*Of Counsel.*

**Admission of Service.**

Receipt of a copy of the foregoing petition for a writ of certiorari, and notice of presentation of the petition for a writ of certiorari is hereby admitted this 17th day of Jan, 1924.

ATTORNEY-GENERAL OF THE UNITED STATES,

Jas. M. Beck

SOLICITOR-GENERAL OF THE UNITED STATES,
*Attorneys for Respondent.*